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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

JOE ALTIERE,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Joe Altiere, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 8, 1965, and is not yet reported; it appears in the printed appendix filed

with, and certified by, the Clerk of the United States Court of Appeals as a part of this record, and transmitted herewith.

The Petition for Rehearing was denied on April 2, 1965, and the order denying said Petition is set forth in the Petitioner's Appendix hereto and in the certified copy of the record.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division was filed on the 8th day of March, 1965. On the 2nd day of April, 1965, it was ordered that the Petition for Rehearing be denied. This Petition is filed within 30 days after the denial of the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. When this Court in its recent decision in *Sansone* defined precisely the circumstances here as proper to the application of Rule 31(c) of the Federal Rules of Criminal Procedure, does not the refusal to instruct on the possibility of finding guilt on the lesser included offense warrant *per curiam* reversal?

2. Has not the defendant been prejudicially and effectively denied the Assistance of Counsel as provided by the 6th Amendment and under circumstances condemned by *Massiah* (377 U.S. 201), *Escobedo* (378 U.S. 478) and *Gideon* v. *Wainwright* (372 U.S. 335)?

3. When a person arrested refuses to respond to questioning until he has talked to his lawyer, and thereafter, under persisting and aggravating questioning and without

the advice of his lawyer, intemperately makes an evasive answer, will the very nature of that answer be sufficient to support willfulness and knowledge essential to conviction?

4. When a person arrested refuses to state his name to the arresting officers until he has talked to his lawyer, may a jury be permitted to draw any adverse inference from his reliance upon his constitutional right to silence and to the advice of counsel?

5. In order to ignore this Court's definitive decisions in *Massiah* (377 U.S. 201) and *Escobedo* (378 U.S. 478), may a Court of Appeals choose to ignore the most hotly contested trial issue (dealing with the defendant's reliance on his Constitutional rights to remain silent and to counsel) and omit any consideration of this point in its opinion?

6. Does knowing what the bookmaking business is all about imply knowledge of the taxing provisions?

7. If the physical description in a "John Doe" warrant is such that it would fit any number of people in the area described—and if from the description, the arresting officer could not identify the person intended by the describer and had to ask the describer who he intended should be arrested —has a general warrant issued?

8. Does the requirement to register and pay the occupational tax under Sections 4411 and 4412 of Title 26, U.S.C., violate the Fifth Amendment's prohibition against compulsory self-incrimination?

9. When Section 4412 of Title 26 requires a person in the business of accepting wagers to register, and the Internal Revenue Service issues a form for registration and arbitrarily denominates it a "return" (11-C), will wilful failure to register constitute a wilful failure to file a return under Section 7203 of Title 26?

STATUTES AND RULE INVOLVED

Title 26, U.S.C.A. Sec. 4401(c), p. 227:

> "(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 525."

Title 26, U.S.C.A. 4411, p. 230:

> "There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 527."

Title 26, U.S.C.A. 4412, p. 232:

> "(a) Requirement.—Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—
>
> (1) his name and place of residence;
>
> (2) if he is liable for tax under subchapter A, each place of business where the activity which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and
>
> (3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.
>
> (b) Firm or company.—Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

(c) Supplemental information.—In accordance with regulations prescribed by the Secretary, he or his delegate may require from time to time such supplemental information from any person required to register under this section as may be needful to the enforcement of this chapter. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 527."

Rule 31(c) of Federal Rules of Criminal Procedure:

"(c) Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

Title 26, U.S.C.A. 7203, p. 202:

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulation, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 851."

Title 26, U.S.C.A. Sec. 7262, p. 322:

"Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000. Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 862."

Title 18, U.S.C.A. 1952, p. 34, pocket part:

"(a) In general.—Any person who fails to register with the Secretary or his delegate as required by this title or by regulations issued thereunder shall be liable to a penalty of $50.

(b) Cross references.—

For provisions relating to persons required by this title to register, see sections 4101, 4273, 4412, 4455, 4722, 4753, 4804(d), 5802, 5841, and 7011.

Aug. 16, 9:45 a.m., E.D.T., c. 736, 68A Stat. 866."

Title 26, U.S.C.A. Sec. 7272, p. 332:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury. Added Pub. L. 87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498."

Title 18, U.S.C.A. Sec. 1084(a), P. 91, pocket part:

"(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both."

Ill. Rev. Stat. 1963, Ch. 38, Sec. 28-1, p. 1553:

"28-1. § 28-1. *Gambling.)* (a) A person commits gambling when he:

(1) Plays a game of chance or skill for money or other thing of value; or

(2) Makes a wager upon the result of any game, contest, or any political nomination, appointment or election; or

(3) Operates, keeps, owns, uses, purchases, exhibits, rents, sells, bargains for the sale or lease of, manufactures or distributes any gambling device; or

(4) Contracts to have or give himself or another the option to buy or sell, or contracts to buy or sell at a future time, any grain or other commodity whatsoever, or any stock or security of any company, where it is at the time of making such contract intended by both parties thereto that the contract to buy or sell, or the option, whenever exercised, on the

contract resulting therefrom, shall be settled, not by the receipt or delivery of such property, but by the payment only of differences in prices thereof; or

(5) Uses or keeps any book, instrument or apparatus for the purpose of recording or registering bets or wagers or holds any funds which have been bet or wagered; or

(6) Sells pools upon the result of any game or contest of skill or chance, political nomination, appointment or election; or

(7) Sets up or promotes any lottery or sells, offers to sell or transfers any ticket or share for any lottery; or

(8) Sets up or promotes any policy game or sells, offers to sell or knowingly possesses or transfers any policy ticket, or other similar device; or

(9) Knowingly advertises any lottery or policy game or drafts, prints or publishes any lottery ticket or share, or any policy ticket or similar device, or any advertisement of any lottery or policy game; or

(10) Knowingly transmits information as to wagers, betting odds, or changes in betting odds by telephone, telegraph, radio, semaphore or similar means; or knowingly installs or maintains equipment for the transmission or receipt of such information.

(b) Participants in any of the following activities shall not be convicted of gambling:

(1) Agreements to compensate for loss caused by the happening of chance including without limitation contracts of indemnity or guaranty and life or health or accident insurance; and

(2) Offers of prizes, award or compensation to the actual contestants in any bona fide contest for determination of skill, speed, strength or endurance or to

the owners of animals or vehicles entered in such contest; and

(3) Pari-mutuel betting as authorized by the law of this State; and

(4) Manufacture of gambling devices, including the acquisition of essential parts therefor and the assembly thereof, for transportation in interstate or foreign commerce to any place outside this State when such transportation is not prohibited by any applicable Federal law.

(c) Penalty.

A person convicted of gambling shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. For each subsequent conviction under Subsection 28-1 (a) (3) through (10) such person shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 3 years, or both fined and imprisoned. As amended by act approved July 8, 1963. L.1963, p.—, H.B.No.374, § 1."

Ill. Rev. Stat., 1963, Ch. 38, Sec. 28-3, p. 1554:

"A 'gambling place' is any real estate, vehicle, boat or any other property whatsoever used for the purposes of gambling. Any person who knowingly permits any premises or property owned or occupied by him or under his control to be used as a gambling place shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. For each subsequent conviction, such person shall be fined not to exceed $1,000 or imprisoned in the penitentiary from one to 3 years, or both. When any premises is determined by a court having jurisdiction to be a gambling place:

(a) Such premises is a public nuisance and may be proceeded against as such, and

(b) All licenses, permits or certificates issued by the State of Illinois or any subdivision or public agency thereof authorizing the serving of food or liquor on such premises shall be void; and no license, permit or certificate so cancelled shall be reissued for such premises for a period of 60 days thereafter; nor shall any person convicted of keeping a gambling place be reissued such license for one year from his conviction, and

(c) Such premises of any person who knowingly permits thereon a violation of any Section of this Article shall be held liable for, and may be sold to pay any unsatisfied judgment that may be recovered and any unsatisfied fine that may be levied under any Section of this Article."

STATEMENT OF THE CASE.

This action was commenced by the return of an indictment charging the Petitioner, Joe Altiere, in two counts, with violating Section 7203, Title 26, United States Code, in that he was engaged in the business of accepting wagers on his own behalf and on behalf of other persons so engaged, without paying the Special Occupational Tax provided under Section 4411 of Title 26, U.S.C. for the taxable year ended June 30, 1964, and that his failure to pay the tax was wilful and knowing; and, with the wilful failure to register as required under Section 4412 of Title 26, U.S.C. and file Internal Revenue Form 11-C with the District Director of Internal Revenue, Chicago, Illinois.

On November 4, 1963, this Petitioner moved the Court, *inter alia*, to dismiss the indictment on the ground that Section 7203 sought, through this indictment, to sanction a failure to comply with the provisions of Sections 4411 and 4412 of Title 26, U.S.C., and that it was unconstitutional and void when so employed in that it violated the Fifth Amendment prohibition as to compulsory self-incrimination; and, further, that Count II of the indictment failed to charge an offense proscribed and sanctioned by the Criminal Statutes of the United States in that Section 4412 required merely that a person register and not that he file a return, and failure to register is not sanctioned under Section 7203. (App. 4-7)

On the same November 4, 1963, this Petitioner moved the Court to suppress evidence obtained as a result of the execution of an arrest warrant authorizing the arrest of a

certain "John Doe", upon which John Doe warrant this petitioner was arrested and searched and questioned incident to and following said arrest. (App. 8-9) Both Motions were denied (App. 24), and the denial was upheld by the United States Court of Appeals. (App. 1-7)

Upon a verdict of guilty as charged, judgment was entered against the petitioner and on January 21, 1964, he was sentenced for a period of sixty days in the custody of the Attorney General on each of Counts 1 and 2, which sentences were to run concurrently, and, he was placed on probation for a period of three years on each of said counts, said periods of probation also to run concurrently and to start at the end of the sixty day period of imprisonment. He was further fined the sum of $1,000 plus costs on Count 1 of the indictment.

STATEMENT OF FACTS.

Gerhard Maisel, a Special Agent of the Federal Bureau of Investigation saw the petitioner on the evenings of August 6, 7, 9, and 10 of 1963, at Sportsman's Park Race Track, in the grandstand section near one of the exit ramps and saw unknown individuals approach him, hand him money, and saw him make notations on slips of paper before each of the various races, and, then, after the races, he saw some of the same individuals also approach the petitioner, and something was passed between the one and the other. (App. 40-41)

On August 20, 1963, Agent Stanley Wheeler of the Intelligence Division of the Treasury Department placed two horse race bets at Sportsman's Park Race Track with the petitioner. He also observed him talking to various individuals and writing something on a piece of paper and putting currency in his pockets. On the 21st of August, Agent Wheeler observed much the same procedure and made a bet with the petitioner on the sixth race, which said bet was paid off by the petitioner after the race (App. 31-32). Agent Wheeler related the above occurrences of August 20 and 21, to Agent Reis Mitchel, also with the Intelligence Division of the Internal Revenue Service. Agent Wheeler gave a description to Agent Mitchel of the person with whom he made the bets. On the basis of what Agent Wheeler told Agent Mitchel, Agent Mitchel signed an affidavit for an arrest warrant of a "John Doe" (App. 18-21, 24-28). The affidavit, the issuance of an arrest warrant, and the arrest of the petitioner occurred on August 24, 1963, and will be treated chronologically hereinafter.

On August 23, 1963, Agent Wheeler again observed the petitioner as aforesaid and made a bet on the sixth race, No. 6, which horse won, and the petitioner gave Wheeler $24.00 at the end of the race. (App. 33)

On August 24, Agent Jerry Henderson, also a Special Agent of the Internal Revenue Service, was informed orally there was an arrest warrant extant for a certain "John Doe", described as a white male, approximately 5'9" to 5'10", 180 to 190 pounds, with reddish brown hair, to be found near the second tunnel of the lower grandstand. This information was given him by the supervisor in charge of the investigation. Agent Henderson did not actually see the arrest warrant until three days later. He proceeded to Sportsman's Park at about 8:30 on that evening and went to the location where he was told "John Doe" might be found and there observed two individuals meeting the description with which he had been furnished. He contacted Special Agent Wheeler in the men's washroom and asked Agent Wheeler which one he should arrest and Agent Wheeler pointed out the petitioner (App. 15-16).

Just before the 6th race on that day, Agent Wheeler approached the petitioner and told him he wanted $5 and $5 on Number 7 and gave him a $10 bill which had been marked by Agent Wheeler with the letter "r" on the backside, which the petitioner placed in his pocket. He was thereupon arrested by Agent Henderson, and another agent (App. 33-34). This occurred at about 10:40, when Henderson showed his badge of office to the petitioner, stating "Federal Officer." The circumstances of the arrest follow:

> "A. At about 10:40 I approached the defendant, along with Special Agent John Walsh. I showed my badge of office to the defendant, stating, 'Federal officer. You are under arrest in that a federal arrest warrant has been issued for your arrest.'

"Q. Was there any reply made by the defendant?

"A. The defendant backed away from me, stating, 'What are you talking about? I have done nothing.'

"Q. Was there any other conversation between you and the defendant at this time?

"A. Yes.

"Q. And what was that, please?

"A. I stated to the defendant, 'You are under arrest for violation of the Federal Wagering Tax Laws,' and then Special Agent Walsh and I secured the prisoner.

"Q. What next, if anything did you do after securing the defendant?

"A. We led the prisoner through the east door of the lower grandstand to Sportsman's Race track, proceeding to our vehicle, which was in the parking lot. After going through the doors, I said to the prisoner, 'What is your name?'

"The prisoner replied to me, 'Wait till we get where we are going and I have talked to my attorney.'

"Q. All right.

"Was there any other conversation between the time you moved from the grandstand to your vehicle?

"A. Yes, sir. I asked the prisoner if he possessed a Federal Wagering Tax stamp.

"Q. What was his reply, if any?

"A. The prisoner stood mute.

"Miss Lavin: I am going to object to that, your Honor, and I move that it be stricken and the jury instructed to disregard it.

"The Court: On what ground, Miss Lavin?

"Miss Lavin: On the ground that standing mute implies nothing; has no probative value. It can have no effect other than to tend to prejudice.

"The Court: Yes, I think I agree with Miss Lavin that the right not to answer questions under the circumstances is perfectly clear, and there is no inference or implication which the jury might properly draw from that except the defendant was doing what he is entitled to or not doing what he is entitled not to do.

"The motion will be granted. The question and answer will be stricken from the record and the jury will disregard it.

• • •

"The Witness: After I arrived in the parking lot, Special Agent frisked the prisoner for offensive weapons. We did not find any. We placed the prisoner in the vehicle to which we were assigned. The prisoner and Special Agent Walsh in the back seat, myself, driving the vehicle, and we proceeded to the United States Courthouse, Chicago. (Tr. 92)

• • •

"A. After we had the prisoner in the car, I stated to him, 'Under the Fifth Amendment to the Constitution of the United States, you are—'

"Miss Lavin: Your Honor, maybe I don't understand.

"The Court: Miss Lavin, let the witness finish his sentence. If you have a motion I will hear it at that time. Certainly there is nothing objectionable to saying what he said so far. Proceed.

"By the Witness:

"A. I stated to the prisoner, 'Under the Fifth Amendment to the Constitution of the United States, you are not required to answer any questions at this time and you realize that anything you do say might be used against you in a future proceeding.'

"The defendant stated, 'I know.'

Special Agent Walsh then asked the defendant how he knew, and there was no answer.

"Miss Lavin: I object to that, and move that it be stricken.

"The Court: Yes, that again—

"By Mr. O'Brien:

"Q. Would you, please just relate what, if anything the defendant may have said.

"The Court: You said that the defendant was asked whether he was employed, by somebody else; is that correct?

"The Witness: Yes, sir, that is correct.

"The Court: Is this a question which he answered?

"The Witness: Yes, sir; it is.

"The Court: All right. What answer did he give?

"The Witness: He stated, 'Pencil Louie.'

* * *

The Witness: "I do not know a Pencil Louie. The defendant said in regard to Pencil Louie that he is a 'tall short guy.'' He related nothing else pertaining to this individual, 'Pencil Louie'. The defendant said nothing else en route to the courthouse. After we arrived at the courthouse, we removed the prisoner from our vehicle and took him to the 8th floor of the building. Special Agent Walsh and myself and the defendant were present. I told the defendant that I was going to search him, incident to his arrest, and he stated, you are not going to search me. I again told the defendant that I was going to search him. He stated, you are not going to search me without a warrant. I then told the prisoner, when we had reached Room 853, that I would search him now. He commenced with removing articles from his pockets. There was no other conversation with the defendant up to this time." (App. 44-47)

All the foregoing (except the circumstances of the issuance of the search warrant) constituted the evidence at the trial. Agent Wheeler further testified, as an expert, that Government's Exhibits 9 through 14, taken from the person of the petitioner, were paraphernalia of one who accepts wagers (App. 65).

It was contended in the United States Court of Appeals for the Seventh Circuit that no warrant should have issued on the hearsay affidavit of Special Agent Reis Mitchel, so long as Stanley Wheeler was, according to the testimony, in Chicago and readily available to execute the affidavit himself, and in any event, Wheeler should not have remained unnamed and anonymous. The Court of Appeals for the Seventh Circuit held:

> "The affidavit of Mitchel set forth he had examined the records of the district director of internal revenue in Chicago on August 23, 1963, for all wagering stamps issued and registration forms 11-C filed in the Chicago internal revenue district for the period beginning July 1, 1963, and ending June 30, 1964,
>
> > '• • • and said examination of those records revealed that no person registered in the name, alias, style or trade name of John Doe described as being a white male, about 5'9" tall, 190 pounds, 30-35 years of age, with red hair, nor was the location of the Sportman's Park Race Track registered as an address where the business of accepting wagers was conducted, nor did the records reflect that the premises was the residence address of any wagering tax stamp holder in the Chicago Internal Revenue District.'
>
> "and that the information upon which the affiant relied in part came from an agent of the same agency, 'acting under my direction and supervision.'" (App. 6-7)

On this basis the Court of Appeals upheld the authority of Special Agent Mitchel to execute the affidavit and held that the affidavit constituted reasonable grounds to afford the commissioner to exercise his judgment and that, therefore, Rules 3 and 4 of the Federal Rules of Criminal Procedure had been complied with.

It was also contended on appeal that there was no showing of actual knowledge of the tax laws, so as to provide the specific intent to violate them. In response to that argument, the Court of Appeals held as follows:

> "We are convinced that proof of willfulness can be inferred from the evidence in this case. It was within the province of the jury to draw all logical inferences from the proof. That defendant was aware of the law and his rights and was contemptuous of the enforcement authorities is indicated by his reference to 'Pencil Louie' as a 'tall, short guy' in response to questions. The jury might well infer from this and other such evidence that defendant knew what his business was all about and that what he was doing he was doing willfully." (App. 7)

It was also contended in the Court of Appeals that the trial court erred when it ruled that the defendant in stating "Wait till we get where we are going and I have talked to my attorney," was not protected by any constitutional right to remain silent as to his name and that from that refusal to tell his name, the jury could infer guilty knowledge. We complained about the lower court's instruction to the jury that guilty inferences from a refusal to to talk could be inferred, except where there was a failure to respond to accusatory statements. Of this complaint the decision of the United States Court of Appeals for the Seventh Circuit says nothing save "we find no error in the instructions which defendant's counsel criticize in their brief." (App. 8)

The same ruling of the United States Court of Appeals was made applicable on a complaint that the jury should have been instructed on their power under Rule 31 of the Federal Rules of Criminal Procedure to find the defendant guilty on the lesser included offenses set forth in Section 7262 and 7272 of Title 26, U.S.C.

Following its earlier decision in *United States* v. *Zizzo,* 338 F. 2d 577 (Pending in this Court for a Petition for Certiorari) and *United States* v. *Cefalu,* 338 F. 2d 582, the Court of Appeals for the Seventh Circuit refused "to sustain defendant's charges that Sections 7203, 4411, 4412, either singly or taken together violate the rights of defendant under the Fifth Amendment to the Federal Constitution."

To the contention that Count II failed to charge a crime, the Court of Appeals for the Seventh Circuit held as follows:

> "This point was unsuccessfully raised by defendants' reply brief in *United States* v. *Pasha, et al.,* 332 F.2d 193 (1964), cert. den. 379 U.S. 839. Inasmuch as defendant in the case at bar placed his reliance on the hope that the Supreme Court would reverse our decision in *Pasha,* the denial of certiorari cannot be said to be 'in out-and-out conflict with the Supreme Court decision in *United States* v. *Carroll,* 345 U.S. 457', as argued in defendant's brief in the case at bar.
>
> "Accordingly, we hold that the conviction of defendant on Count II is not in derogation of the separation of powers as contended by defendant." (App. 4-5)

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit for the following reasons:

1. The Court of Appeals for the Seventh Circuit has sanctioned the refusal to apply Rule 31(c) of the Federal Rules of Criminal Procedure, in circumstances where this Court has held it should be applied; and its decision is in conflict with applicable decisions of this Court and with decisions of the 3rd and District of Columbia circuits.

2. The Court of Appeals bases its finding of wilfulness and knowledge on an answer of the petitioner, made after he had advised his questioners that he wished to say nothing until he had talked to his attorney, an answer made as the result of continuing persistent questions in violation of the Sixth Amendment to the Constitution of the United States, applicable decisions of this Court, and in conflict with decisions of other Circuits.

3. The jury was invited to draw inferences of guilt from petitioner's constitutional right to silence on arrest and on his reliance on his right to the advice of counsel, and this breach of fundamental due process warrants this Court's exercise of its supervisory powers to vacate a conviction wrongfully obtained.

4. The Statutes of the United States give a convicted defendant the right of appeal. When a Court of Appeals ignores a major challenge to the legality of his conviction, the defendant has been effectively deprived of that statutory right, and this deprivation warrants this Court's exercise of supervisory powers to void a conviction wrongfully upheld.

5. From his knowledge of the bookmaking business, the Court of Appeals for the Seventh Circuit inferred petitioner had knowledge of the taxing laws in conflict with a decision of the Fifth Circuit.

6. "John Doe" arrest warrants are recognizedly being used with increasing frequency by federal agents. The requirements for issuance and the sufficiency of such warrants has become an important federal question, which has not been, but should be, determined by this Court.

7. The enactment of Federal legislation making criminal certain activities of persons in the business of accepting wagers, and this Court's decisions in defining the privilege against self-incrimination to extend to incrimination under State as well as Federal law renders the constitutionality of the taxing and registration provisions of Sections 4411 and 4412 gravely doubtful and constitutes an important question of Federal law which has not been, but should be, settled by this Court.

8. Section 4412 requires a person engaged in the business of accepting wagers to register. Regulations enacted by the Treasury Department under authority of that section require such persons to register and file a return. Prosecutions for wilful failure to file that return constitute executive legislation and this Court should, in its supervisory power, prohibit such prosecutions.

I.

This Petitioner was convicted of a wilful failure to pay the tax and to file the return which is required under Sections 4411 and 4412 of Title 26, U.S.C. The defendant asked the Court to instruct the jury pursuant to Rule 31(c) that it could find a guilt on the lesser included offenses set forth in 7262 and 7272 of Title 26, U.S.C.

This Court very lately set out the basic principles controlling whether or not an instruction allowing the jury to find guilt on a lesser included offense should be given in a case.

> "The basic principles controlling whether or not a lesser included offense charge should be given in a particular case have been settled by this Court. Rule 31(c) of the Federal Rules of Criminal Procedure provides, in relevant part, that the 'defendant may be found guilty of an offense necessarily included in the offense charged.' Thus, '(i)n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie(s) it . . . (is) entitled to an instruction which would permit a finding of guilt of the lesser offense.' *Berra* v. *United States, supra,* at 134. See *Stevenson* v. *United States,* 162 U.S. 313. . . . In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense. *Berra* v. *United States, supra; Sparf* v. *United States, supra,* at 63-64." *Sansone* v. *United States,* 33 LW 4269 at 4271.

The indictment in this case charged the petitioner with accepting wagers on his own behalf and on behalf of other persons who were engaged in that business without paying the Special Occupational Tax on wagering and that such failure to pay the tax was wilful and knowing. Section 7262 makes any person who does an act which makes him liable for the occupational tax included in 4412, without having paid the tax, subject to a fine of not less than $1,000 and not more than $5,000. Thus 7262 includes all the elements of this indictment except wilfulness and knowledge.

It clearly meets the standards set forth by this court. To find this defendant guilty of 7262 would allow the jury to find guilt if the element of wilfulness and knowledge required for the charged offense were not present or were not proved beyond a reasonable doubt.

Similarly Count II charged that this Petitioner wilfully and knowingly failed to register and file a return Internal Revenue Service Form 11-C, as required by Section 4412 of Title 26, USC. Section 7272 of Title 26, U.S.C. provides that any person who fails to register with the Secretary or his delegate as required by Title 26 or by regulations issued thereunder shall be liable to a penalty of $50. Again, clearly the charged greater offense required the jury to find the disputed factual elements of knowledge and wilfulness, which elements were not required for conviction of the lesser included offense encompassed in Section 7272.

We submit that the refusal to give the charge as requested (App. 125, 126, 76) violates the principals set down by this Court for the proper utilization and invocation of Rule 31 (c) of the Federal Rules of Criminal Procedure, and its decision has interpreted the rules of procedure in a way in conflict with applicable decisions of this Court. We also submit that the interpretation is in direct conflict with decisions of other circuits. Particularly, we submit it directly conflicts with the decision of the Third Circuit which *sua sponte* noted the application.

> ... Had the court found him guilty of failure to pay the tax under Section 3294(a), this subsection not requiring proof of wilfulness, the fine on Count I would have to have been at least $1,000. The offense proscribed by Section 3294(a) is in all probability a lesser one than that defined by Section 3294(c) which, as has been pointed out, relates to willful violations. We do not have to decide this question and the possible ap-

plication of Rule 31(c), Fed. Rules. Cr. Proc., for the case was tried by the United States on the theory of willful violations and so went to the trier of the facts. The record in the trial court is devoid of any suggestion that a penalty should have been posed for a non-willful failure to pay the tax under Section 3294(a). The issue of possible application of Rule 31 (c) was not raised by the parties in this court. We have adverted to it *sua sponte* to the end that possible future confusion may be avoided." *United States* v. *Kahriger*, 210 F. 2d 565, 571.

We also submit that the rule has been applied in a manner conflicting with the decisions of the Court of Appeals for the District of Columbia.

"Appellant was convicted of assault with a dangerous weapon, defined in 22 D.C. Code §502. The evidence was to the effect the assault was with a soda pop bottle. Counsel for appellant requested the court to instruct the jury on simple assault as a lessee included offense, which the court refused to do. Appellant was entitled to such an instruction if a foundation for it is found in the evidence. See *Eagleston* v. *United States*, 172 F. 2d 194, 198, 12 Alaska 213 (9th Cir., 1949), cert, denied 336 U.S. 952, 69 S.Ct. 882, 93 L.Ed. 1107 (1949). cf. *Hunt* v. *United States*, 115 U.S. App. D.C. 1, 4, 316 F. 2d 652, 655 (1963); *Young* v. *United States*, 114 U.S. App. D.C. 42, 309 F. 2d 662 (1962). And see Rule 31 (c), Fed R. Crim. P. We think the issue whether in the circumstances shown by the evidence the pop bottle was a dangerous weapon was for the jury to decide, thus furnishing the foundation for the requested instruction. Indeed, the trial judge seems to have been of this view, for he instructed the jury as follows:

'If you find that the defendants or either of them committed an assault upon Clarence Ivory with a bottle, and you find that the bottle was a dangerous weapon, then that would come within the definition of the statute of an assault with a dangerous weapon.'

> "This instruction, together with the denial of an instruction on simple assault, may well have caused members of the jury to conclude that the assault was with a dangerous weapon, when they might have concluded otherwise if permitted to do so without acquitting appellant. Since the evidence left the character of the weapon an open question, an instruction on the lesser included offense, duly requested, was required to complete the statement of law applicable to the evidence." *Greenfield* v. *United States*, C.A. D.C. 341 F. 2d 411, 412, 413.

II.

Unlike *Fagundes* v. *United States*, 1st Cir., 340 F. 2d 673, *infra*, petitioner was pressed with further questions of the Internal Revenue Agents, after he indicated his desire to remain mute until he consulted with counsel, until he blurted that his employer was "Pencil Louie" and he described him as a "tall-short guy." From this the Court of Appeals found the evidence of knowledge of the law and wilfulness to sustain the guilty finding.

> "The defendant was aware of the law and his rights and was contemptuous of the enforcement authorities was indicated by his response to by his reference to 'Pencil Louie' as a 'tall-short guy' in response to questions. The jury might well infer from this and other such evidence that defendant knew what his business was all about and what he was doing he was doing wilfully." (App. 7)

There was no "other such evidence" and, of course, no one ever contended that this petitioner did not know he was taking bets. But, we submit to use as a predicate for guilt a flippant answer given under continued questioning after he had indicated the desire to keep silent until after he had consulted with an attorney, violates this Court's decision in *Gideon* v. *Wainwright*, 372 U.S. 335, *Massiah* v. *United States*, 377 U.S. 201 and *Escobedo* v. *State of Illinois*, 378 U.S. 478.

We also submit that using this statement as a basis for conviction is in direct conflict with the 5th Circuit decision in *Clifton* v. *United States*, 341 F. 2d 649.

"There is scarcely any doubt about the fact that the officials at the jail knew that Clifton had counsel and perhaps knew his name and address. It is obvious that other persons connected with the prosecution possessed this information, and doubtless the court records revealed the identity of counsel. It would not have been burdensome for the investigating officers to have ascertained the facts."

"Clifton testified without contradiction that in the period prior to making the statement, he had repeatedly requested persons at the jail to telephone counsel, and they neglected to do so. It is clear that Clifton had voluntarily requested the federal agents to come see him, but apparently he did not disclose that he wished to make a confession at that time. On February 3, he was interviewed in a small interrogation room near his cell. When he was being removed from his cell to be taken to the interview room, he 'asked the Captain * * * to please call (his) lawyer,' indicating again his desire to have counsel present during the interrogation. The agent testified that he advised Clifton 'of his rights' at the outset of the interview, but Clifton asserted that no mention was made of his attorney or his right to have one present. Clifton apparently did not request the interviewing agents to call his attorney. It is nonetheless undisputed that the F.B.I. agents made no attempt to determine whether Clifton had an attorney.

* * *

"... The record in this case discloses that the interviewing officers should have known that the accused was represented by counsel, and that they made no reasonable effort to ascertain whether he desired to consult with his attorney. In the particular circumstances of this case, their failure in the above respect

constitutes a denial of the guaranties of the sixth amendment. Hence, any incriminating statement made at the interview cannot be admitted into evidence at his trial." *Clifton* v. *United States,* 5 Cir., 341 F. 2d 649, 652, 653.

We also submit that such use of a flippant, evasive answer is in conflict with the 2nd Circuit decision in *United States* v. *Bufalino,* 285 F. 2d 408.

> "Even an otherwise law abiding citizen who is stopped and interrogated by police, and who is given no reason for his detention and questioning, may feel it his right to give as little information as possible and even perhaps to respond evasively if he believes he might thereby be earlier rid of police inquiry. That others may at times go to the brink of truth, or beyond, is likely, particularly when, as may have been true in the present case, they know that the existing law does not require them to give a truthful account to police officers." *United States* v. *Bufalino,* 2 Cir., 285 F. 2d 408, 415.

Relying upon such a statement as a basis for upholding the judgment of guilt is in conflict with the Eighth Circuit:

> "'Seemingly, the colloquy between appellant and Officer Ubben, wherein appellant in response to the suggestion, 'I bet you stole it,' replied, 'I wouldn't doubt it,' is regarded as supplying the final link in the chain of circumstances relied upon to establish probable cause. We are not persuaded to believe however, that the statement made by appellant is entitled to be recognized as a direct admission, so as to supply the deficiency which was obviously existing when such statement was made. The authorities lend support to this conclusion.
>
> "'In *Brinegar* v. *United States, supra,* where the arrest and search were sustained, no expression whatever appears in the opinion of the majority as to the weight, if any, which accorded to this colloquy between one of

the agents and the accused; 'Hello, Brinegar, how much liquor have you got in the car this time,' and the reply 'not too much' or 'not so much.'" *Pigg* v. *United States,* 337 F. 2d 302, 305.

In *Greenwell* v. *United States,* the Court of Appeals for the District of Columbia, after observing that the statements of Greenwell were not spontaneous admissions on arrival at a police station, held:

> "Ordinarily, arrest is the culmination, not the beginning, of police investigation. Under our adversary system confessions, including those obtained after the accused has been advised of his rights by the police, are not the normal proofs upon which convictions are obtained. Secret extra-judicial examination to produce damning evidence cannot be allowed to render useless or unavailing the right to 'a trial' 'in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law.'" *Massiah* v. *United States, supra,* 377 U.S. at 204, 84 S. Ct. at 1202. To admit such evidence 'would make the trial no more than an appeal from the interrogation; and the "right to use counsel at the formal trial (would be) a very hollow thing (if), for all practical purposes, the conviction is already assured by pretrial examination." *Escobedo* v. *Illinois, supra,* 378 U.S. at 487, 84 S. Ct. at 1763." *Greenwell* v. *United States,* 336 F. 2d 962, 966.

III.

The immediate circumstances of this petitioner's arrest are as set forth, *supra,* pgs. 14-17.

Over the objection of the petitioner the Court instructed the jury as follows:

> "The rule is that after taking a defendant into custody, an arresting officer may make an accusatory statement to the defendant in his presence or to him

with a view to prompting some admission of guilt. The rule further is that the defendant is not required to reply to any accusatory statement made to him or in his presence, either orally or in writing. Accordingly, any accusatory statement or any failure to make a reply thereto is not to be considered by you as evidence of any kind against the defendant, and it may not create any presumption or any inference one way or the other with respect to his guilt or innocence." (App. 81)

The reasoning of the trial court is reflected in the record:

"Mr. Regan: Agreed, but his refusal to give his name, coupled with no reaction, no nothing, except, I know my constitutional rights.

The Court: I don't think you can argue from that. Maybe you can argue from his refusal to give his name, because I take it a man's name is not privileged, not a Fifth Amendment right, to refuse to give your name is not a Fifth Amendment right. The cases are perfectly clear on that. I suppose you can argue from his refusal to give his name that this was evidence of some kind of guilty knowledge, or guilty knowledge of law violation, perhaps. Perhaps.

• • •

Miss Lavin: I can't see a man—well, knowledge being impressed on him from an exercise of what are his rights.

The Court: I agree.

Miss Lavin: A man having knowledge imputed to him from a refusal to give his name is entirely—

The Court: No, that is not to give his name. No. The Fifth Amendment does not cover the right not to disclose your name, and the cases are very clear on that.

Miss Lavin: There are some cases on that.

The Court: I take it that the privilege against self incrimination does not include the privilege of non-disclosure of your identity.

Miss Lavin: What about a man in custody being obliged to do anything? Can any inference be drawn from the fact that he elects to do nothing?

The Court: I take it that you can draw an inference from a man's refusal even to identify, to give his name, because I take it that is not a privileged piece of information. I don't quite see how a man's name can tend to incriminate him.

Miss Lavin: I can see very well in this particular case where a man's name can incriminate him.

The Court: How?

Miss Lavin: I think it was encompassed in the motion to suppress the evidence, that the basic element could never have been found out without finding out of that name, and that is whether or not—

The Court: To file a return?

Miss Lavin: Yes.

The Court: Well, on that basis every tax violator would be privileged not to disclose his name, and so long as he could keep it a secret they could never prove that he violated the income tax laws.

Miss Lavin: There are other ways of identifying him.

The Court: I don't think that that is—I don't know of any cases which says that the privilege against self incrimination includes the right not to identify yourself when asked, the right to refuse to state your name when apprehended in the alleged commission of a crime, and that the refusal to identify yourself is part of privileged communication.

Miss Lavin: I don't know of any case on the refusal to state your name, nor do I know of any case where inference can be drawn from standing mute.

The Court: No, there are cases in which inference can be drawn from standing mute, just as inference can be drawn from flight." (App. 116-121)

We submit the instruction of the trial court was in direct conflict with the decision of the First Circuit in *Fagundes* v. *United States,* 340 F. 2d 673, where the Court said at pages 676 and 677:

"The arresting officer in the course of describing Fagundes's arrest testified that when he flushed Fagundes out of Mrs. Poulo's closet he announced 'you are under arrest in connection with the armed robbery of the Brookline Trust Company.' The officer then added that he asked Fagundes what he had to say, to which Fagundes replied that he did not want to say anything but wanted to see a lawyer.[4] This testimony related directly to the appellant's arrest and was descriptive of that event. It was not even specifically objected to. Its admission was not error.

* * *

"*Massiah* v. *United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed. 2d 246 (1964), teaches that incriminating post indictment statements elicited from an accused in the absence of his counsel deprive the accused of his constitutional right to counsel under the Sixth Amendment and cannot be introduced in evidence against him at his trial. *Escobedo* v. *United States,* 378 U.S. 478, 84 S. Ct. 1758, 12 L.Ed. 2d 977 (1964), goes further. It teaches that the constitutional right

[4] The record does not show that Fagundes was pressed by further questions of any police officer either in Mrs. Poulos' apartment or elsewhere, or that he ever made any statement to the police or that his request for counsel was denied or frustrated in any way.

to counsel arises at least when an accused is arrested and perhaps even at an earlier stage when police attention begins to 'focus' on the accused whenever that may be. Thus when Fagundes said when he was arrested and handcuffed that he wanted to see a lawyer he was exercising a federal constitutional right. And certainly at that juncture he had the constitutional right to keep silent. Id. at 485, 84 S.Ct. 1758. His assertion of one constitutional right, his right to counsel, and his reliance upon another constitutional right, his right to remain silent when charged with crime, we think cannot be used against him substantively as an admission of guilt, for to do so would be to render the constitutional rights mere empty formalities devoid of practical substance. See dissenting opinion in *Jones* v. *United States,* 111 U.S. App. D.C. 276, 296 F. 2d 398, 410, cert. denied, 370 U.S. 913, 82 S. Ct. 1260, 8 L. Ed. 2d 406 (1962).

* * *

"In the second place we think it reversible error to permit a jury to draw any inference adverse to one accused of crime from his reliance upon his constitutional right to silence and to the advice of counsel. The right to silence on arrest is akin to the right to decline to take the witness stand in one's own defense. *Helton* v. *United States,* 221 F. 2d 338, 341-342, (C.A. 5, 1955)" *Fagundes* v. *United States,* 1 Cir., 340 F. 2d 673, 676, 677.

We also submit that the action of the trial court is in direct conflict with other Trial and Circuit Court's.

In *United States* v. *Kelly,* D.C.D.C. 119 F. Supp. 217, the police read to the defendant a confession of his co-defendant. The defendant stated, "I'll tell my story to my lawyer." And, "I have nothing to say at this time". After discussing the several cases on the subject, the Court, in granting a new trial, held:

> "But whatever may be the correct rule with regard to silence on the part of a defendant upon reading a statement attributing crime to him, the facts of this case present a different problem. Defendant Kelly was not silent. His statements 'I'll tell my story to my lawyer' and 'I have nothing to say at this time' appear to be the assertion of his legal right to refuse to talk. During an examination by the police while under arrest a defendant, usually conscious and often cautioned that anything he says may be used against him, well may be restrained from participating in a discussion of the case with police officers by a belief his interests will better be served at the time by exercising his right to remain silent. It is not reasonable to interpret an assertion of right as constituting an admission of guilt. Kelly's refusal to comment on Washington's confesion may therefore not be construed as an admission of guilt, and is not admissible in evidence against him." *United States* v. *Kelly*, D.C.D.C., 118 F. Supp. 217, 222.

Again in *McCarthy* v. *United States*, 6 Cir., 25 F.2d 298, the Court said at p. 299:

> "Sometimes or often, in the earlier stages of the matter, there may be such a duty or impulse; but, after the arrest and during an official examination, while respondent is in custody, it is common knowledge that he has a right to say nothing. Only under peculiar circumstances can there seem to be any duty then to speak. Lacking such circumstances, to draw a derogatory inference from mere silence is to compel the respondent to testify; and the customary formula of warning should be changed, and the respondent should be told, 'If you say anything, it will be used against you; if you do not say anything, that will be used against you.' "

Again, in *United States* v. *Curry*, 227 F. Supp. 773 the United States District Court for the Eastern District of New York, was faced with a similar problem. There the defendant was arrested on a warrant.

"He was warned that he need not make any statement, that those he did make could be used in a court of law and that he had a right to consult a lawyer. He was then promptly taken to F.B.I. headquarters on 69th Street in Manhattan, thoroughly searched, offered toilet facilities and again warned that he did not have to make any statements, that any he made could be used against him in a court of law and that he could consult an attorney. Curry said he did want a lawyer and was told to use the telephone, which was made available to him. He then said he did not know an attorney. The matter apparently was dropped with that." *United States* v. *Curry*, 227 F. Supp. 773, 775.

The Court held:

* * * Few men are ever more vulnerably parties to a more gravely menacing proceeding than was Curry. Curry's need of counsel was absolute and exigent. It was a known need. The inculpatory statements taken when he was unrepresented may not be read against him on the Government's case. * * *

"It is agreed that Curry said he wanted a lawyer and then admitted that he did not know one to call and that then the questioning went on. It is found that a substantial part of the time was spent on getting biographical and background data of Curry himself and in getting data on Wilcoxson and Nussbaum. That these topics were readily separable from or separated from the rest of the interviewing is not found. It is found that a primary objective of the interrogation was to obtain from Curry admissions of his guilty involvement and a confession if possible. There is no evidence and it is not found that a purpose of the session was to verify in any other way the data already in hand or to obtain and immediately run down leads that would inculpate or exculpate Curry before further proceedings were taken.

"(5-12) On all the facts it is concluded that Curry's statements of February 13, 1962, were illegally obtained because, *first* he sought counsel, he exigently

needed counsel, and the interrogation was nevertheless continued without according him counsel's advice; the 'warning' was given but when its most critical element was wisely invoked—by a statement that the assistance of counsel was desired—it was not implemented; *second* the interrogation exceeded the limits proper to an occasion the limits of which are prescribed by the *McNabb-Mallory* rule and Rule 5(a) in going beyond the immediate needs of police administration and seeking, in the absence of defense counsel, evidence from the defendant himself for use both to secure an indictment and to prove its allegations; and, *third*, the interrogation took place during a detention illegally protracted in violation of Rule 5(a) and the *McNabb-Mallory* rule. * * *" *United States* v. *Curry*, 227 F. Supp. 773, 776, 777, 778.

IV.

The fact of this petitioner's refusal to state his name until he had consulted with a lawyer and the allowing of the jury to draw inferences of guilt from that refusal was the most hotly contested single issue in the trial of this cause. (App. 111-122) The fact of the existence of this issue and the fact that this petitioner gave the answer "Pencil Louie", the tall short guy, only after repeated questioning by the Agents subsequent to his indicating his desire to speak to counsel and his desire to remain silent gets no recognition by the Court of Appeals for the Seventh Circuit in its opinion.

We think this omission is clearly an attempt to avoid the impact of this Court's decisions in *Massiah* (377 U.S. 201) and *Escobedo* (378 U.S. 478). If a trial court is obliged to give an opinion upon any point relevant to the issue, we submit a Court of Appeals should be bound in similar matter. We submit that this action of the United States Court of Appeals for the Seventh Circuit is contrary to the spirit of decisions of this Court and of other circuits.

"As stated by Chief Justice Marshall in *Douglass and Mandeville* v. *McAllister*, 3 Cranch, 298, 2 L.Ed. 445, the court is certainly bound to give an opinion, if required, upon any point relevant to the issue."

Schmeller v. *United States*, 6 Cir., 143 F. 2d 544, 551.

V.

The only evidence in this cause was that petitioner was a bookmaker, accepting wagers, keeping records of wagers, and that he made a flippant remark to the Internal Revenue Agents under persistent questioning after arrest and after he had demonstrated the knowledge of his constitutional rights and expressed a desire for assistance of counsel. From this the Court of Appeals for the Seventh Circuit held:

"The jury might well infer from this and such other evidence the defendant knew what his business was all about and that what he was doing he was doing wilfully." (App. 7)

This decision is in direct conflict with that of the 5th Circuit in *Edwards* v. *United States*, 321 F. 2d 324, where, in a concurring opinion, Judge Gameron said:

"It cannot be mentioned too often that prosecutions such as these which we are reviewing are prosecutions for the violation of federal taxing laws, not for the violation of gambling laws. And, "in construing [the statutes] we would not be justified in resorting to collateral motives or effects [a congressional desire to suppress wagering] which, standing apart from the federal taxing power, might place the constitutionality of the statute in doubt." *United States* v. *Calamaro*, 1957, 354 U.S. 351, 358, 77 S. Ct. 1138, 1143, 1 L.Ed. 2d 1394. In short, whether one gambles or not is of no concern to the federal government, except insofar as the taxing power alone is involved.

Judge Rives suggests in his dissent that to require affirmative proof that the defendants are aware of the taxing requirements will make convictions exceedingly rare. Besides the fact that we do not hold here that positive, affirmative proof is required, if that be the result, so be it. Such a possibility does not warrant, in my opinion, the suggestion in the dissent that we take judicial notice of the fact that all persons engaged in the gambling business are aware of the requirements. In dealing with this serious business of taking citizens' liberties, we are not privileged to assume that the "tax is so well known as to be one of the most frequent subjects of conversation among professional gamblers." The fact is that I doubt exceedingly if it is true that all "professional" gamblers know of the tax. Nor does such a possibility warrant a holding that defendants affirmatively establish ignorance of the requirements. To do so would certainly put the burden of proving innocence on the defendants, a result which is clearly unconstitutional. Moreover, taking judicial notice of defendants' knowledge would in effect be to convert the crime charged to imprisonment for debt to the government, rather than for evasion of tax liabilities." *Edwards v. United States*, 321 F. 2d 324, 327.

VI.

This petitioner was arrested on a "John Doe" warrant, wherein "John Doe" was described as being a white male, about 5'9" tall, 190 pounds, 30-35 years of age, with red hair, found on the premises of Sportsman's Park Race Track. (App. 24)

Sportsman's Park Race Track is a half mile track on Chicago's south-west side, where flat racing is seen in the day-time during the appropriate season and trotters are seen at night. The Court took judicial notice that large numbers of people attend—be it five thousand or fifteen thousand. (App. 17)

Jerry Henderson, the Special Agent who executed the warrant, said he did not see the warrant until three days after execution. He said he was provided a description of John Doe, as a white male, approximately 5'9" to 5'10" tall, 180 to 190 pounds, with reddish brown hair and that the person he was to arrest would probably be found near the second tunnel of the lower grandstand at Sportsman's Park Race Track. He went to the vicinity of Sportsman's Park Race Track, the second tunnel of the lower grandstand, and there observed two individuals meeting the description he had been furnished. He then met with Special Agent Wheeler in the men's washroom at Sportsman's. According to Agent Jerry Henderson, "I knew which individual to arrest because the defendant was pointed out to me at Sportsman's Race Track on the evening of August 24, 1963, by Special Agent Stanley R. Wheeler." (App. 15-16). It was because Agent Wheeler had told him to arrest the man in the blue sport coat that he arrested him rather than the other man that fitted the description that had been given to him. (App. 16)

It is thus readily demonstrated that the description of "John Doe" orally given to the arresting agent Henderson was not the same as that included in the warrant. Nowhere in the arrest warrant is the second tunnel of the lower grandstand at Sportsman's Park mentioned. It is obvious that the second tunnel of the lower grandstand of Sportsman's Park is more definite than "the premises of Sportsman's Park Race Track", as that description is set forth in the warrant. Nonetheless, even with the more precise location defined, Agent Henderson was not able to identify this petitioner with sufficient certainty for him to make the arrest, and he was required to call upon Agent Wheeler to point out the petitioner.

Actually neither the description in the warrant or the oral description given to Mr. Henderson was appropriate to the petitioner. He was at the time of arrest 29 years old, 5'9½" tall, weighing 265 pounds (75 pounds more than the description), and had auburn hair and brown eyes (App. 52). We submit the discrepancy in the actual description of the defendant and that set forth in the warrant, plus the positive testimony that the arresting officer could not identify him on the description given by the warrant makes the arrest illegal.

Judge Frank W. Wilson of the District Court for the Eastern District of Tennessee, Southern Division, lately noted the frequency of the practice of using "John Doe" arrest warrants and noted the dearth of authority upon the use of such warrants, and in response to the growing practice and the dearth of authority wrote a decision in *United States* v. *Swanner*, 237 F. Supp. 69, in which he relied heavily upon this Court's decision in *West* v. *Cabell*, 153 U.S. 78:

> "While it might with reason be contended that the constitutional prohibition of general warrants would be met if a particular person was in fact intended and the Court might look to the knowledge and intent of the officer issuing the warrant or the officer serving the warrant in making a determination of whether a particular person was intended and what particular person was intended, the issue appears to be decided otherwise in the case of *West* v. *Cabell*, 153 U.S. 78, 14 S.Ct. 752, 38 L.Ed. 643 (1894). There the Supreme Court held that a warrant for the arrest of a person of a certain name, *i.e.*, 'James West', not otherwise designated or describing him, would not justify the arrest of a person who had never been known or called by that name, bearing rather the name of Vandy M. West, irrespective of the intention of the issuing officer that Vandy M. West was in fact the person

> designated as the subject of the warrant. The Court there in effect held that the validity of the warrant must be tested from the identifying information on the face of the warrant and that testimony of the intention of the issuing officer could not be considered in determining whether the defendant was in fact intended to be the subject of the warrant." *United States* v. *Swanner*, 237 F. Supp. 69, 71-72.

We submit the execution of the warrant in this case is violative of those principles.

VII.

Section 4411 imposes a $50 special tax to be paid by persons "engaged in the business of accepting wagers" or who are engaged in receiving wagers for or on behalf of a person "engaged in the business of accepting wagers." Section 4412 of Title 26 United States Code requires that such persons register their name and address; if they are "engaged in the business of accepting wagers," each place of business where they are so engaged and the name and place of residence of each person employed by them; and if they are engaged in receiving wagers on behalf of a person "engaged in the business of accepting wagers" the name and address of the employer.

Section 1084 of Title 18 United States Code proscribes the use of wire facilities for transmission in interstate commerce of bets, wagers, or information assisting in the placing of bets or wagers by any person "engaged in the business of betting or wagering." Section 1952 of Title 18 United States Code proscribes interstate travel and the use of the mails with intent to distribute the proceeds of any business enterprise involving gambling, or otherwise promote, manage, establish, carry-on, or facilitate the promotion, management, establishment, or carrying-on of any business enterprise involving gambling.

It is immediately apparent that a basic element of proof under Section 1084 is the showing that a person accused thereunder was "engaged in the business of betting or wagering." Sections 4411 and 4412 compel a disclosure that a person is "engaged in the business of accepting wagers." It is a basic element of proof under Section 1952 that the person accused be in a "business enterprise involving gambling." Thus, to comply with the provisions of Sections 4411 and 4412 is to compel confession of the basic elements of the crimes recited above.

In this connection, thorough consideration of the possibility of compulsory self-incrimination of persons engaged in the business of wagering through the provisions of Sections 4411 and 4412 of Title 26 U.S.C., must be given to the fact that Section 1952 defines any business enterprise involving gambling as an "unlawful activity." Thus, such registration requires an admission of an activity defined as unlawful by the statutes of the United States.

It has been held that the privilege against self-incrimination extends to information which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime. *Hoffman* v. *United States,* 341 U.S. 479. This being so, it cannot be doubted that the privilege extends to information which, by operation of statute, *prima facie* establishes proof of necessary elements in the commission of crime.

Further, compliance with Sections 4411 and 4412 of Title 26, U.S.C., violates against the Fifth Amendment's prohibition against compulsory self-incrimination under state law. In *Murphy* v. *Waterfront Commission of New York,* 378 U.S. 52, the law regarding the privilege of self-incrimination under the Fifth Amendment to be:

> "We hold that the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." 84 S. Ct. at 1609.

Section 4412 of Title 26, U.S.C. makes requirements that information be filed including the name and place of residence of the person registering as well as the place of business where he is in the business of accepting wagers. This information is clearly violative under state law.

Illinois Law (p. 8, *supra*) subjects to criminal penalty anyone who keeps books and records or apparatus for the business of recording bets or wagers. Section 4401 requires the payment of tax on wagers, which in turn requires the keeping of records of wagers made. A registration that you are liable to the tax under 4401 is substantially complete proof of a violation of State law.

The registration provisions of Section 4412 require that the person required to register list the places where he does business. Illinois Law (p. 9, *supra*) makes criminal the use of premises or property as a gambling place. Listing such places as is required by Section 4412 is an admission of violation of State law.

On the foregoing basis we submit that the requirement to register and pay the occupational tax under these sections is violative of the prohibition against compulsory self-incrimination.

VIII.

Count II of this indictment charges a violation of Section 7203 of Title 26, U.S.C., in that he was required by law and by lawful regulations made under authority thereof to register with and to file with the District Director of Internal

Revenue "a return, Internal Revenue Form 11-C." Section 7203 of Title 26, United States Code does not proscribe a failure to register. The source of the crime alleged here is, apparently, found in Section 4412 of Title 26, U.S.C. That section provides that each person required to pay the special occupational tax under Sections 4401 and 4411 *must register.* The regulation of the Treasury Department was issued purportedly to implement the statute. The regulation, known as 26 C.F.R. 44.4412-1(a), provides that every person required to pay the special tax imposed by Section 4411 *shall register and file a return.* It is apparent that the requirement in the registration that return be filed is not found in Section 4412 of the Code. The regulation plainly goes beyond the requirements of the Statute upon which it relies. It is clear that a regulation may not alter a statute. *Manhattan General Equipment Co.* v. *C. I. R.*, 297 U.S. 129, 135. This regulation obviously does alter the statute.

Nor is this the first time that Treasury regulation has attempted to expand upon the statutory requirements of Sections 4411 and 4412. In denouncing such expansion the United States Supreme Court said in *Calamaro* v. *United States,* 354 U.S. 351 at 358-9:

> "We find neither argument persuasive. In light of the above discussion, we cannot but regard this Treasury Regulation as no more than an attempted addition to the statute of something which is not there. As such the regulation can furnish no sustenance to the statute."

Treasury Regulations have been consistent in their efforts to enlarge statutory requirements. They have just as consistently been thwarted by Supreme Court in limiting their legislative tendencies.

> "But we are told that Treasury regulations long in force require an allocation of the original cost between

the preferred stock purchased and the common stock received as dividend. And it is said that while no provision of the statute authorizes a specific regulation respecting this matter, the general power conferred by the law to make appropriate regulations comprehends the subject. Where the act uses ambiguous terms, or is of doubtful construction, a clarifying regulation or one indicating the method of its application to specific cases not only is permissible but is to be given great weight by the courts. And the same principle governs where the statute merely expresses a general rule and invests the Secretary of the Treasury with authority to promulgate regulations appropriate to its enforcement. But where, as in this case, the provisions of the act are unambiguous and its directions specific, there is no power to amend it by regulation." *Koshland* v. *Helvering*, 295 U.S. 441, 446-7.

CONCLUSION.

Wherefore, this Petitioner prays this Court issue its Writ of Certiorari to review the decision of the Court of Appeals for the Seventh Circuit entered herein.

Respectfully submitted,

ANNA R. LAVIN,
MAURICE J. WALSH,
Attorneys for Petitioner.

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 14571 SEPTEMBER TERM, 1964—JANUARY SESSION, 1965

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOE ALTIERE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MARCH 8, 1965

Before HASTINGS, *Chief Judge,* and SCHNACKENBERG and KNOCH, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Joe Altiere, defendant, has appealed from his conviction in the district court, on a two-count indictment charging violations of 26 U.S.C.A. § 7203.[1]

Count I of the indictment charged defendant with engaging in the business of accepting wagers on his own

[1] Defendant was sentenced to sixty days imprisonment concurrently on each count and placed on probation effective 60 days after start of the period of imprisonment. He was also fined $1,000 and costs.

behalf and on behalf of other persons who were engaged in that business without paying the special occupational tax on wagering for the taxable year ended June 30, 1964, and that such failure to pay the tax was willful and knowing. Count II charged that defendant willfully and knowingly failed to register and file a return, Internal Revenue Service Form 11-C, with the District Director of Internal Revenue.

1. By motion to dismiss defendant attacked the indictment, in that § 7203, in seeking to sanction a failure to comply with the provisions of 26 U.S.C.A. §§ 4411 and 4412, is unconstitutional and void when so employed, because it violates the fifth amendment's prohibition as to compulsory self-incrimination.

26 U.S.C.A. § 4411 imposes a special tax of $50 per year to be paid by each person who is liable for tax under § 4401 or who is engaged in receiving wagers for or on behalf of any person so liable. Said § 4401 imposes on each person who is engaged in the business of accepting wagers a tax on all wagers placed with him.

§4412 requires each person required to pay a special tax to "register with the official in charge of the internal revenue district".

26 U.S.C.A. § 7203 imposes penalties for willful failure to make tax returns, keep records and supply information.

While defendant's motion to dismiss filed in the district court did not contend that §§ 4411, 4412 are unconstitutional, in this court he takes the position that "the requirement to register and pay the occupational tax under Sections 4411 and 4412 * * * violates the Fifth Amendment's prohibition against compulsory self-incrimination."

He points out that 18 U.S.C.A. § 1084 provides a criminal penalty for anyone engaged in the business of betting or wagering who knowingly uses a wire communication facility for the transmission in interstate commerce of bets, wagers, or information assisting in the placing thereof. Likewise he cites 18 U.S.C.A. § 1952 as a proscription against interstate travel and the use of the mails with intent to distribute the proceeds of any business enterprise involving gambling, or otherwise promote, manage, establish, carry-on, or facilitate the promotion, management, establishment, or carrying-on of any business enterprise involving gambling. It is argued that a basic element of proof under § 1084 is a showing that a person accused thereunder was "engaged in the business of betting or wagering" and that §§ 4411 and 4412 compel a disclosure that a person is "engaged in the business of accepting wagers". Further, it is argued that a basic element of proof under § 1952 is that the accused is in a "business enterprise involving gambling". Thus, defendant argues that compliance with §§ 4411 and 4412 compels a confession of the basic elements of the crimes.

Defendant relies on *Hoffman* v. *United States,* 341 U.S. 479, and *Blau* v. *United States,* 340 U.S. 159, 161. Both of these cases sustained the right of a witness to refuse to answer certain questions before a grand jury under the circumstances therein set forth.

Defendant urges that in *United States* v. *Frank Zizzi,* recently decided by this court, 338 F. 2d 577 (1964), it was contended that since defendant Zizzo was required, by law, to file returns, their use as evidence by the government against him violated his privilege against self-incrimination.

But this court, at 581, stated:

"We think pertinent is a statement of the Supreme Court in Lewis v. United States, 348 U.S. 419, 422, 75 S.Ct. 415, 417-418, 'If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the tax and make the prescribed disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment.'

"We hold that it was not error to receive the returns in evidence, and that defendant Zizzo was not deprived of any of his constitutional rights thereby."

Zizzo was cited with approval in *United States* v. *Cefalu*, 338 F. 2d 582, 585 (1964) where we held:

"* * * that the act of registering as required by 26 U.S.C.A. § 4412 is not an incriminating act contemplated by 18 U.S.C.A. § 1952 and, based upon our holding in Zizzo, the act of registering does not violate the Fifth Amendment since the registrant may freely choose whether to subsequently engage in the unlawful activities proscribed by 18 U.S.C.A. § 1952."

For these reasons we refuse to sustain defendant's charges that §§ 7203, 4411, 4412, either singly or together, violate the rights of defendant under the fifth amendment to the federal constitution.

2. Defendant further argues, as he did in the district court, that Count II is based upon an unconstitutional derogation of the separation of powers in that it purports to impose criminal penalties for failure to comply with an executive regulation by the treasury department.

This point was unsuccessfully raised by defendants' reply brief in *United States* v. *Pasha*, et al., 332 F.2d 193

(1964), cert. den. 379 U.S. 389. Inasmuch as defendant in the case at bar placed his reliance on the hope that the Supreme Court would reverse our decision in *Pasha*, the denial of certiorari cannot be said to be "in out-and-out conflict with the Supreme Court decision in *United States* v. *Carroll*, 345 U.S. 457", as argued in defendant's brief in the case at bar.

Accrdingly, we hold that the conviction of defendant on Count II is not in derogation of the separation of powers as contended by defendant.

3. Defendant complains that the warrant upon which he was arrested was issued on an improper and insufficient affidavit, and hence the arrest was invalid and the motion to suppress the evidence obtained as a result thereof should have been granted.

We find from the record that the affiant was Reis Mitchel, special agent, Intelligence Division, Internal Revenue Service, to whom and under whose direction and supervision another special agent was acting, the latter having knowledge of wagering operations and being familiar with wagering paraphernalia and being assigned to investigate wagering-tax violations. According to Mitchel's affidavit, the special agent acting under his supervision told him that he had placed three horse race wagers at the Sportsman's Park race track with a white male, age 30-35, 5' 9" tall, 190 pounds with red hair, known as John Doe, on August 20 and 21, 1963, at which time the latter made notations on a 3" x 5" card held in a racing program; and that he received a pay-off on a winning wager from this person on August 21, 1963.

The affidavit of Mitchel set forth that he had examined the records of the district director of internal revenue in Chicago on August 23, 1963, for all wagering stamps

issued and registration forms 11-C filed in the Chicago internal revenue district for the period beginning July 1, 1963, and ending June 30, 1964,

> "* * * and said examination of those records revealed that no person registered in the name, alias, style or trade name of John Doe described as being a white male, about 5'9" tall, 190 pounds, 30-35 years of age, with red hair, nor was the location of the Sportsman's Park Race Track registered as an address where the business of accepting wagers was conducted, nor did the records reflect that the premises was the residence address of any wagering tax stamp holder in the Chicago Internal Revenue District."

and that the information upon which the affiant relied in part came from an agent of the same agency "acting under my direction and supervision."

It is our opinion that the affidavit set forth the facts sufficiently and afforded the commissioner who issued the warrant an opportunity, as an independent judicial officer, to examine the facts before him. We think that, for the reasons assigned by us in *United States* v. *McCormick*, 309 F.2d 367 (1962), cert. den. 372 U.S. 911, the affidavit in support of the arrest warrant in this case was sufficient. In *McCormick*, at 372, we said, as to the issuing of a search warrant:

> "* * * We refuse to hold that such information, when communicated in the course of official business by the agents among themselves, is excluded by the hearsay rule, so as to require the quashing of a search warrant issued upon the affidavit of one of the agents setting forth his reliance upon such information. Our position is in harmony with the modern view as to the use of hearsay evidence to support the issuance of a search warrant, announced in *Jones* v. *United States*, 362 U.S. 257, 271, 80 S. Ct. 725, 4 L.Ed. 2d 697 (1960):

> 'We conclude therefore that hearsay may be the basis for a warrant. We cannot say that there was so little basis for accepting the hearsay here that the Commissioner acted improperly. The Commissioner need not have been convinced of the presence of narcotics in the apartment. He might have found the affidavit insufficient and withheld his warrant. But there was substantial basis for him to conclude that narcotics were probably present in the apartment, and that is sufficient. * * *' "

4. We consider as harmless to defendant that he was arrested upon what is known as a "John Doe" warrant, or that special agent Jerry Henderson, who executed the warrant, may have been assisted by agent Wheeler in identifying defendant as the person described in the warrant. Actually the record shows that the arresting agent spent his time after entering the race track in surveillance of the activities of defendant and another. This demonstrates the sufficiency of the description in the warrant. The fact that he verified with another agent the correctness of his identification of defendant simply shows his desire to be careful.

5. Defendant contends that there was no proof that he was aware of the federal tax and that he knowingly and willfully refused to pay it and to register.

We are convinced that proof of willfulness can be inferred from the evidence in this case. It was within the province of the jury to draw all logical inferences from the proof. That defendant was aware of the law and his rights and was contemptuous of the enforcement authorities is indicated by his reference to "Pencil Louie" as a "tall, short guy" in response to questions. The jury might well infer from this and other such evidence that defendant knew what his business was all about and that what he was doing he was doing willfully.

6. We cannot agree with defense counsel that the evidence fails to show that defendant was required to file a form 11-C in the office of the district director of internal revenue at Chicago. It is admitted that he did not so register in Chicago. The district court was of the opinion that there was a prima facie case proved that defendant was engaged in the business of accepting wagers at Sportsman's Park, near Chicago. We find no error in the court's ruling.

7. Neither do we think that the trial court abused its discretion in allowing agent Wheeler, on the showing made, to testify as an expert on gambling. Furthermore, this witness was cross-examined at great length by defense counsel relative to his opinion testimony.

8. We find no error in the instructions which defendant's counsel criticize in their brief.

For the foregoing reasons, the judgment of the district court and the sentence thereon are affirmed.

JUDGMENT AND SENTENCE AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

In the

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60610

Monday, March 8, 1965

Before

HON. JOHN S. HASTINGS, *Chief Judge*

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*

HON. WIN G. KNOCH, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JOE ALTIERE, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 14571

This case came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court and the sentence thereon in this cause appealed from be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

In the

United States Court of Appeals

For the Seventh Circuit

Chicago Illinois, 60610

Friday, April 2, 1965

Before

HON. JOHN S. HASTINGS, *Chief Judge*

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*

HON. WIN G. KNOCH, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JOE ALTIERE, *Defendant-Appellant.* No. 14571	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for rehearing filed by appellant herein be, and the same is hereby DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 100

JOE ALTIERE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner was convicted, after a jury trial, on both counts of an indictment charging him with violations of 26 U.S.C. 7203, relating to certain wilful omissions under the Internal Revenue Code. Count I of the indictment charged petitioner with wilful failure to pay the special occupational tax imposed by Section 4411 of the Code upon persons engaged in the business of accepting wagers on their own account or for others; Count II charged petitioner with wilful failure to register under Section 4412 of the Code as a person required to pay the special occupational tax (R. 3–4).[1] Petitioner received sentences of

[1] "R. —" refers to the Appendix to petitioner's brief in the court of appeals.

sixty days' imprisonment on each count, the terms to run concurrently, and three years' probation on each count, the terms to begin at the expiration of the prison sentences and to run concurrently. In addition, a fine of $1,000, plus the costs of prosecution, was imposed under Count I (R. 131). The court of appeals affirmed (Pet. App. 1–8).

The petition raises a number of challenges to the conviction, among them the contention that petitioner was entitled under Count I to an instruction on a lesser included offense. We agree that petitioner had such a right under this Court's recent decision in *Sansone* v. *United States,* 380 U.S. 343, and that this error warrants a new trial. Accordingly, we confine our discussion to this issue.

The evidence at trial showed that, during the evenings of August 6, 7, and 9, 1963, petitioner was seen by an F.B.I. agent at Sportsman's Park Race Track, Chicago, Illinois, under circumstances creating a suspicion that petitioner was engaged in the business of accepting wagers (R. 40–41). On August 20, 1963, an Internal Revenue Service agent observed petitioner near a stairway at the racetrack, and placed two horse race bets with him. Petitioner accepted money tendered by the agent and made a notation on a slip of paper (R. 31–32). On the following evening, petitioner was again observed at the same location; the agent again placed a horse race bet with him which petitioner recorded; and the agent collected winnings from petitioner after the race (R. 32–33; Government

Ex. 1). The same process was repeated on August 23, 1963 (R. 33; Government Ex. 3). On none of these occasions was petitioner observed going to the racetrack betting windows (R. 32, 34–39). On August 24, 1964, an arrest warrant was issued. That evening petitioner was again observed by agents, and an agent used a marked ten-dollar bill to place a bet with him (R. 33–34, 36, 42–43; Government Ex. 5). Petitioner was then arrested (R. 44).

One of the issues at trial was whether petitioner's failure to register and pay the special tax under the Code had been wilful, *i.e.*, whether the jury "might conclude from all of the circumstantial evidence that the defendant knew of the existence of the statute and the requirements thereunder" (R. 123). At the close of trial, petitioner requested an instruction under Count I (R. 125) that, should the jury find that petitioner "was a person required to pay the tax * * * and that he did fail to pay such tax" but that "there is no independent evidence on which you could find that such failure was done with a bad or evil motive," then the jury might "return a verdict of guilty upon a lesser offense, which is found in Title 26 United States Code Section 7262" making failure to pay the tax a crime regardless of wilfulness and imposing

only a fine, rather than the fine and jail sentence provided by Section 7203 for wilful failures.[2] This instruction was refused.

In *Sansone* v. *United States,* 380 U.S. 343, 349–350, decided after the decision of the court of appeals in this case, the government contended, and the Court held, that " '[i]n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie[s] it * * * [is] entitled to an instruction which would permit a finding of guilt of the lesser offense' " but that "[a] lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense." In this case, the offense charged in Count I under Section 7203 required a disputed element—wilfulness—not necessary to conviction under Section 7262. In all other respects, the elements of the two offenses were the same. Petitioner, having made a proper request, was thus entitled under *Sansone* to the Count

[2] Section 7262 of the Code provides:

> Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

I instruction relating to Section 7262. We believe this error warrants a new trial.[3]

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

JULY 1965.

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[3] An argument supporting the conviction could be made, despite the error on Count I, if the conviction on Count II could be sustained, for a concurrent jail sentence was imposed on that Count and the fine imposed on Count I was the minimum which could have been imposed under Section 7262. Petitioner requested a lesser-included offense instruction on Count II as well as on Count I, and this instruction was also refused (R. 125–126). Count II charged a wilful failure to register, and the requested instruction was under Section 7272 of the Code, which provides:

> Any person * * * who fails to register with the Secretary or his delegate as required by this title or by regulations issued thereunder shall be liable to a penalty of $50.

Whether the analysis given above in regard to the requested Count I instruction also applies to the requested Count II instruction turns on the question whether Section 7272 creates a civil penalty (as we believe likely) or defines a criminal offense. This question has not been the subject of any considered decision in the lower federal courts, and we do not press it upon this Court but suggest, rather, that the entire case should be remanded for a new trial in the light of the intervening *Sansone* decision.